

TESTIMONY BEFORE THE MICHIGAN HOUSE  
NATURAL RESOURCES, TOURISM, AND OUTDOOR RECREATION COMMITTEE

June 5, 2012

Presented by:

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Testimony of David L. Powers

Good Morning, Mr. Chairman and Representatives. My name is David Powers. I am an attorney from Bay City, and have practiced law for 26 years. Since 2001, I have devoted a substantial part of my practice to the issue of riparian rights on the Great Lakes. I was involved in drafting the 2003 beach grooming law, and in negotiating the 2007 General Permit language. My firm has participated in several important court cases involving riparian rights, including *United States v. Kincaid* and *Glass v. Goeckel*. For the last five years, I represented the United States on the International Joint Commission's Upper Great Lakes Study. I am also a co-founder of Save Our Shoreline.

My purpose today is to set out what this bill does and does not do. But first, I would like to provide some background.

In Michigan, beaches are regulated under the Shorelands Protection and Management Act, known as Part 323 of NREPA. That law authorizes the MDEQ to designate those areas of the shoreline that are so important that they deserve protection. Under this law, the MDEQ has a duty to protect high erosion areas, Flood Risk Areas, and Environmental Areas. The law requires that MDEQ determine these areas by conducting studies

and surveys. To designate someone's land as an "environmental area," the Department must show that the area is "necessary for the preservation and maintenance of fish and wildlife."

[Refer to Board #1]. The Department has done much of this work. This board shows you the counties around the state where they have designated land to be protected. In each of these counties, the Department has identified specific parcels of land to be protected under Part 323.

[Refer to Board #2]. This board is a compilation of maps of Environmental Areas for the Saginaw Bay. You will see that well more than half of the Bay is already protected as Environmental Areas. Today's bill does nothing to change the protection of these areas.

Instead, today's bill addresses what is left: For Saginaw Bay, less than half of its remaining shoreland. That is the land that's not regulated by Part 323.

Our problem--and the reason we are here today--is that the MDEQ has taken the view that two other laws regulate what is left. Those laws are Part 303--Wetland Protection, and Part 325, Submerged Lands. MDEQ believes that beaches come within the

definition of "wetlands" under part 303. They also believe that beaches are regulated as "submerged lands" under part 325, the Submerged Lands Act.

We don't think these laws were ever intended to regulate beach grooming. Our beaches don't come within the definition of "wetland" under Part 303 (because they are not commonly referred to as bogs, swamps, or marshes—an essential part of the definition). And our dry beaches are not the state-owned "submerged lands" addressed by the Submerged Lands Act.

So **this** bill is very simple: it clarifies that on typical beaches where the soil is simply sand, rock, or pebbles, the Department will not regulate leveling of sand, removal of vegetation, grooming of soil, or removal of debris, under either Part 303 or under Part 325. And even on other beaches, the bill allows the mowing of vegetation. This should help beach owners to control *phragmites* on their beaches.

I would like to be clear about what the bill DOES NOT do. It DOES NOT have the state giving up any public trust right. It DOES NOT take away the "beach walking" right referred to in the **Glass v Goeckel** decision. These assertions were never true about previous versions of the Bill, but because some groups

made those arguments about the bill's language, the Senate further amended the bill to take those arguments away.

The bill DOES NOT expose valuable wetlands to imminent loss and destruction. First, as part of our negotiations, the MDEQ was very careful to insist that most provisions apply only to beaches of sand, rock, or pebbles. By definition, these are not wetlands, because they don't have wetland soils. Second, as I have indicated, Part 323, the Shorelands Protection and Management Act, authorizes the Department to protect any area shown by studies and surveys to be **necessary** for the preservation of fish and wildlife. The MDEQ still has the tools to protect those areas. Finally, the Corps of Engineers regulates the same lands, making state regulation a duplication of effort, and in our view, a waste of taxpayer money. For those that would argue that the Feds won't do an adequate job, I would point you to what happened in 2001. Both the MDEQ and the Corps of Engineers sent hundreds of letters to shoreline owners, telling them that beach grooming violated the law. But when it came time to file lawsuits, it was the Corps of Engineers--and not the state--that sued three retirees for grooming the beaches in front of their retirement homes.

This Bill is the product of much work and compromise that included the Bill's sponsors, shoreline owners, MDEQ, and the Governor's legal advisors. It has been my pleasure to work with Senator Casperson, Kendra Everett, Director Wyant, Jamie Clover Adams, Maggie Cox, and Todd Losee in putting this bill before you today.

Thank you.